

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
STATESVILLE DIVISION
CRIMINAL DOCKET NO.: 5:04CR27-1-V**

UNITED STATES OF AMERICA

vs.

**FRANKLIN HOWARD ENSMINGER,
Defendant.**

)
)
)
)
)
)
)

ORDER

THIS MATTER comes before the Court upon remand from the Fourth Circuit Court of Appeals for purposes of correcting a clerical error in the Judgment.¹ FED. R. CRIM. P. 36. More specifically, the transcript of the sentencing hearing indicates that the oral pronouncement of sentence was 83 months as opposed to the sentence on the Judgment & Commitment Order - 77 months. In accordance with the mandate of the Fourth Circuit, the Clerk of Court is directed to prepare an Amended Judgment reflecting a term of imprisonment of 83 months rather than 77 months.

However, the Court notes the following: 1) a contract court reporter (as opposed to an employed regular / official court reporter) was present on the date of Defendant's sentencing hearing; 2) the contemporaneous notes of both the Courtroom Deputy and Presentence Investigation Officer reflect that the court orally announced a 77 month term of imprisonment; 3) defense counsel's contemporaneous handwritten notes from the sentencing hearing indicate that the court orally announced a 77 month term of imprisonment; 4) the prosecutor's contemporaneous handwritten notes from the

¹ The mandate issued August 24, 2006.

sentencing hearing indicate that the court orally announced a 77 month term of imprisonment; 5) after entry of the written judgment, neither the U.S. Attorney nor the Defendant questioned the accuracy of the Judgment & Commitment Order noting a 77 month term of imprisonment; and 6) the practice in this district at the time Defendant was sentenced was to have the Judgment & Commitment Order “proofed” by as many as three different court personnel prior to submission to the sentencing judge for signature (Courtroom Deputy, U.S. Presentence Officer, and Law Clerk).

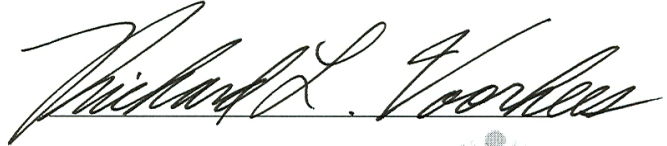
The undersigned is unable to recall the specific sentence pronounced in open court. However, the undersigned made notes of the decisions handed down at sentencing, and those notes were made available to the Law Clerk for purposes of reviewing the Judgment & Commitment Order. The undersigned believes a 77 month sentence was the intention of the Court.

For these reasons, the undersigned is concerned that, in this particular case, due to inadvertence or inattention by the court reporter, the true intent of the sentencing judge is not accurately reflected in the official sentencing transcript. United States v. Morse, 344 F.2d 27, 30 (4th Cir.1965) (“we should carry out the true intention of the sentencing judge as this may be gathered from what he said at the time of sentencing”). Nevertheless, because the mandate of the Circuit Court is unequivocal,

IT IS HEREBY ORDERED that the Clerk of Court shall prepare an **Amended Judgment** reflecting that Defendant is subject to a term of imprisonment of 83 months, all other terms and conditions remaining the same.

IT IS FURTHER ORDERED that the Clerk shall forward a copy of the Amended Judgment and the instant Order to the relevant parties.

Signed: November 8, 2006

A handwritten signature in black ink, reading "Richard L. Voorhees", written over a horizontal line.

Richard L. Voorhees
United States District Judge

